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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

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No. 329

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OTHO A. COOK, COMMISSIONER OF REVENUES FOR THE  
STATE OF ARKANSAS,

*Appellant,*

*vs.*

WARREN W. WILSON, ET AL.

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**STATEMENT AS TO JURISDICTION UNDER RULE 12**

This appeal is taken from an opinion rendered by the Arkansas Supreme Court, which is the Tribunal of last resort in the State of Arkansas. The case was originally filed in the Garland Chancery Court of Arkansas, with Warren W. Wilson, et al., as Plaintiffs and Murray B. McLeod, Commissioner of Revenues for Arkansas, as Defendant. The case was appealed from the Chancery Court to the Arkansas Supreme Court by the Commissioner. Later Otho A. Cook, the successor of Murray B. McLeod, was designated appellant by permission of the Supreme Court. The opinion from which this appeal lies was rendered April 2, 1945, and appears in the Arkansas Law Reporter, Vol. 83, No. 1, Page 938.

The Arkansas Supreme Court in rendering its opinion grounded that part in which the cross appeal is taken upon an issue not raised by either of the parties to the law suit.

The question involved in the State Court was whether the Commissioner of Revenues had the authority to collect a Severance Tax from Warren W. Wilson, et al., upon timber which was severed on lands which lie in the National Forests.

The Court held as follows: (L. Rep. Vol. 83, No. 1, Page 945)

“(A) *Territorial Jurisdiction.* The federal legislation covering national forests is found in U. S. C. A. Title 16, Par. 471, *et seq.* The federal statutes show that national forests are established in two ways: (a) by presidential proclamation declaring certain lands of the public domain to be a national forest. This is under Par. 471, and only includes lands that had never passed from the United States. (See *Light v. U. S.*, 523, 55 L. Ed. 570). (b) The purchase or acquisition of other lands under Par. 516. These lands are acquired by the Federal Government only after the Legislature of the State has consented to such acquisition. This Par. 516 is the Act of Congress of March 1, 1911.

Regarding timber severed from lands incorporated into the national forest by presidential proclamation under Par. 471, we hold that the State has no right to collect the severance tax because the State never had the “residuum of jurisdiction,” as that language is used in the cases of *James v. Dravo* and *Mason v. Washington, supra*. Appellant claims that U. S. C. A. Title 16, Par. 480, gives the State the right to impose the tax in such a case. We construe that section as allowing civil and criminal jurisdiction, but not allowing taxation.

Regarding timber severed from lands incorporated into the national forest by *acquisition* under Par. 516, we hold that the State has the right to collect the severance tax, so far as territorial jurisdiction is con-

cerned, because the State has the "residuum of jurisdiction." The Arkansas Legislature, by Act No. 148 of 1917, and by Act No. 108 of 1927 (See Pars. 5646-7, Pope's Digest), gave the consent of the State of Arkansas to the acquisition by the United States of lands for the establishment, consolidation and extension of national forests as provided by the Act of Congress of March 1, 1911, "provided, that the State of Arkansas shall retain a concurrent jurisdiction with the United States in and over lands so acquired so far that civil process in all cases, and such criminal process as may issue under the authority of the State of Arkansas against any person charged with the commission of any crime without or within said jurisdiction, may be executed thereon in like manner as if this act had not been passed." A comparison of Pars. 5646-7 of Pope's Digest with the West Virginia statutes shown in the case of *James v. Draro*; *supra*, leads to the inevitable conclusion that the State of Arkansas still retains its residuum of jurisdiction over lands that became a part of the national forest under U. S. C. A. Title 16, Par. 516.

Appellees, in their claim for tax immunity, cite *C. O. & G. Ry. v. Harrison*, 235 U. S. 292, 59 L. Ed. 234, and *Oklahoma v. Barnsdall*, 296 U. S. 521, 80 L. Ed. 366. Each of these cases involved a severance tax levied by the State of Oklahoma on minerals from Indian lands, and in each case the tax was not permitted. We distinguish these cases in two ways: (1) these cases were decided prior to *James v. Draro*, and (2) in these cases, the minerals were held by the United States Government as a trustee for Indian tribes. The State of Oklahoma had never ceded the lands to the United States Government, and therefore has no "residuum of legislative authority." The original title was in the United States as trustee for the Indians, and that original title in the United States prevented the State from exercising any tax rights without the permission of the United States."

"1. That the appellees are not liable to the State for severance tax on timber severed by them from lands

held by the United States as original owner (U. S. C. A. Title 16, Par. 471); and to that extent the decree of the chancery court is affirmed; \* \* \* (L. Rep. Vol. 83, No. 1, Page 949).

It is believed by the cross appellant that the Court erred in holding that the State Severance Tax could not be collected from timber severed from the National Forests, with reference to that portion of the forests so proclaimed under U. S. C. A. Title 16, Par. 471. The State has at all times during this case asserted that it has the right to collect the Severance Tax on timber severed from all portions of the National Forests. Since the Supreme Court of Arkansas has interpreted the Federal Statutes adversely to the contention of the State, it is believed by the cross appellant that a substantial federal question is raised and for a determination of which an appeal has been taken to the Supreme Court of the United States.

The cross appellant believes the following cases support its appeal with reference to the jurisdiction of this Court:

*Miedreich v. Lauenstein*, 232 U. S. 236, 242, 58 L. Ed. 584, 589, 34 Sup. Ct. Rep. 309; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 257, 58 L. Ed. 591, 595, 34 Sup. Ct. Rep. 305, Ann. Cases 1914C, 159, 9 N. C. C. A. 109; *Rogers v. Hennepin County*, 240 U. S. 184, 188, 60 L. Ed. 594, 597, 36 Sup. Ct. Rep. 265; *State of California v. Deseret Water, Oil & Irrigation Company*, 243 U. S. 415, 64 L. Ed. 821.

The Federal Statutes involved herewith and pertinent to the issue are as follows:

"Para. 471. National forests; establishment; limitation on additions in certain States; lands suitable for production of timber.

The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the

public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests, and the limits thereof.

(a) No national forest shall be created, nor shall any additions be made to one created prior to June 25, 1910, within the limits of the States of California, Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress.

(b) The President, in his discretion, is authorized to establish as national forests or parts thereof, any lands within the boundaries of Government reservations, other than national parks, reservations for phosphate and other mineral deposits, or water-power purposes, national monuments and Indian reservations, which in the opinion of the Secretary of the department now administering the area and the Secretary of Agriculture are suitable for the production of timber, to be administered by the Secretary of Agriculture under such rules and regulations and in accordance with such general plans as may be jointly approved by the Secretary of Agriculture and the Secretary formerly administering the area, for the use and occupation of such lands and, for the sale of products therefrom. Any person who shall violate any rule or regulation promulgated under this subdivision shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$500 or imprisoned for not more than one year, or both. (March 3, 1891, c. 561, Par. 24, 26 Stat. 1103; March 4, 1907, c. 2907, 34 Stat. 1271; June 25, 1910, c. 421, Par. 2, 36 Stat. 847; Aug. 24, 1912, c. 369, 37 Stat. 497; June 7, 1924, c. 348, Par. 9, 43 Stat. 655.) (U. S. C. A. Title 16, Par. 471).

"Para. 480. Civil and criminal jurisdiction.

The jurisdiction, both civil and criminal, over persons within national forests shall not be affected or changed by reason of their existence, except so far as the punishment of offenses against the United States

therein is concerned; the intent and meaning of this provision being that the State wherein any such national forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State. June 4, 1897, c. 2, Par. 1, 30 Stat. 36; March 1, 1911, c. 186, Par. 12, 36 Stat. 963." (U. S. C. A. Title 16, Par. 480).

"Para. 516. Purchase of lands approved by commission; consent of State; exchange of lands; cutting and removing timber.

The Secretary of Agriculture is authorized to purchase, in the name of the United States, such lands as have been approved for purchase by the National Forest Reservation Commission at the price or prices fixed by said commission. No deed or other instrument of conveyance shall be accepted or approved by the Secretary of Agriculture under this section until the Legislature of the State in which the land lies shall have consented to the acquisition of such land by the United States for the purpose of preserving the navigability of navigable streams. With the approval of the National Forest Reservation Commission as provided by this section and section 515 of this title, and when the public interests will be benefitted thereby, the Secretary of Agriculture is authorized, in his discretion, to accept on behalf of the United States title to any lands within the exterior boundaries of national forests acquired under said sections which, in his opinion, are chiefly valuable for the purposes as therein stated, and in exchange therefor to convey by deed not to exceed an equal value of such national forest land in the same State, or he may authorize the grantor to cut and remove an equal value of timber within such national forests in the same State, the values in each case to be determined by him. Before any such exchange is effected notice of the contemplated exchange reciting the lands involved shall be

published once each week for four successive weeks in some newspaper of general circulation in the county or counties in which may be situated the lands to be accepted, and in some like newspaper published in any county in which may be situated any lands or timber to be given in such exchange. Timber given in such exchanges shall be cut and removed under the laws and regulations relating to such national forests, and under the direction and supervision and in accordance with the requirements of the Secretary of Agriculture. Lands so accepted by the Secretary of Agriculture shall, upon acceptance, become parts of the national forests within whose exterior boundaries they are located, and be subject to all the provisions of sections 480, 500, 513-519 and 521 of this title. March 1, 1911, c. 186, Par. 7, 36 Stat. 962; March 3, 1925, c. 473, 43 Stat. 1215." (U. S. C. A. Title 16, Par. 516).

The State Statutes involved herewith and pertinent to the issue are as follows:

"Pope's Digest, Par. 13371. Tax levied. There is hereby levied a privilege or license tax, to be known as 'the Severance Tax,' for the year 1923 and for each subsequent year, upon each person, firm, corporation or association of persons, hereinafter called 'the producer,' engaged in the business of mining, cutting or otherwise severing from the soil or water for commercial purposes natural resources, including minerals and ores, pearls, diamonds and other precious stones, bauxite, fuller's earth, phosphates, shells, chalk, cement, clay, sand, gravel, asphalt, ochre, oil, gas, salt, sulphur, lignite, coal, marble, stones and stone products, timber, turpentine and all other forest products and all other natural products of the soil or water of Arkansas. Section 1, Act 118 of 1923."

"Pope's Digest, Par. 13372. Permit to sever resources. Any person, firm, corporation or association desiring to engage in the business of severing natural resources as contemplated by this Act, shall before en-

tering upon such business, make application for license or permit therefor to the Commissioner of Revenues.

Such application shall, on forms to be prescribed by the Commissioner, state under oath the name of the applicant, the business in which applicant desires to engage, and the counties in which the operations are to be carried on, and the amount and value of the anticipated production of the ensuing month based on applicant's operation for the preceding month. In such form the applicant shall expressly agree to abide by the provisions of this Act and promptly to pay the severance tax hereby imposed upon its subsequent ascertainment based upon the Producer's Report as hereinafter required.

The applicant shall expressly obligate himself to pay at the end of the ensuing monthly period, as hereinafter prescribed, the amount of such estimated tax, more or less, according to the actual production, and shall consent that such severance tax shall constitute and remain a lien on each unit of production until paid into the State Treasury as hereinafter provided.

Upon the filing of such application, the Commissioner shall estimate the amount of the tax which shall accrue as based upon said anticipated production and shall issue a permit, wherein shall be stipulated such estimated amount.

Whoever shall engage in the business of severing natural resources, without having made application for and secured a license or permit, as contemplated by this Act, shall be guilty of a misdemeanor and upon conviction shall be fined not less than twenty-five (\$25.00) dollars nor more than One Hundred (\$100.00) Dollars. Ib. Par. 2, as amended by Act 283 of 1929, Sec. 1, March 29, 1929."

"Pope's Digest, Par. 13373. Producers to report to Commissioner of Revenues. Every producer shall, within ten days after the end of each month, file with the Commissioner of Revenues a verified report of the business conducted by such producer during the past preceding month.

Said Producer's Report shall be made upon forms prescribed by the Commissioner of Revenues, and shall truly set forth the kind of natural resources and place where severed or produced, the gross quantity and actual cash value thereof, and such other reasonable and necessary information as the Commissioner may require for the proper enforcement of the provisions of this Act.

The report required by this Section shall be signed and sworn to by the individual producer or by a member of the producing firm, if a partnership, or by the president, secretary or managing producer, if a corporation. A willful false swearing as to the contents of said report shall constitute the crime of perjury and shall be punished as such.

The report herein prescribed shall be prepared and executed in triplicate, one copy of which shall be by the producer filed with the County Clerk in the county wherein the producer is doing business. Said report so filed shall be preserved as a public record.

The failure of any person, firm, corporation or association to make the statements required by this Section shall be punished by fine of not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500.00) for each such offense. Ib. Par. 3 as amended by Act 283 of 1929, Sec. 2."

"Pope's Digest, Par. 13374. Privilege tax. Except as to the production of certain natural resources, the privilege tax upon which is hereinafter specially provided for, each producer at the time of rendering such monthly report, shall concurrently file a duplicate thereof with and pay to the State Treasurer, through the Commission of Revenues, a privilege tax amounting to two and one-half (2½) per cent of the gross cash market value of the total production of such natural resources during the preceding monthly period.

The value of such products shall be computed as of the time when and at the place where the same have been severed or taken from the soil or water, and in their unmanufactured state immediately after such

severance. Provided, this Act shall not apply to nor shall any severance tax be required of the individual owner of timber who occasionally severs or cuts from his own premises such stocks, logs, poles or other forest products as are utilized by him in the construction or repair of his own structures or improvements, the purpose of this clause being to exempt therefrom such severers as utilize forest products to their own personal use and not for sale, commercial gain or profit.

Every person, firm, corporation or association, severing any natural resources under the provisions of this Section, shall be liable to the State for the severance tax imposed herein, and in addition thereto the tract of land from which product was severed shall be subject to the lien hereinafter created. Ib. Par. 4, as amended by Act 283 of 1929; See. 3."

"Pope's Digest, Par. 13382. Who liable for tax. Except as otherwise in this Section provided, the making of said reports and the payment of said privilege taxes shall be required of the severer or producer actually engaged in the operation of severing natural products whether as owner, lessee, concessionaire or contractor.

The reporting taxpayer shall collect or withhold out of the proceeds of the sale of the products severed the proportionate parts of the total tax due by the respective owners of such natural resources at the time of severance.

And in the case of oil and gas, such production as shall be sold or delivered to any pipe line company and transported by it through pipes connected with the oil or gas well of the owner shall notwithstanding such sale or delivery be liable for the tax herein levied.

Every producer actually operating any oil or gas well, quarry or other property from which natural resources are severed, under contract or agreement requiring payment direct to the owner of any royalty, excess royalty or working interest, either in money or in kind, is hereby authorized, empowered and required to deduct from any such royalty or other interest the

amount of the severance tax herein levied before making such payment:

Any person, firm, corporation or association failing or refusing to comply with any of the provisions of this Section shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not less than Fifty Dollars (\$50.00) nor more than Five Hundred Dollars (\$500.00), for each offense. Ib. Par. 8, as amended by Act 283 of 1929. See. 6."

This cross appeal is taken pursuant to Section 237, Judicial Code, as amended; 28 U. S. Code Ann., See. 344(a)-861(a).

If the Court should hold that appeal is not the proper remedy, then pursuant to Section 237(c) of the Judicial Code, 28 U. S. Code Ann., Section 344(c), we ask that this be treated as an application for certiorari (*Memphis Natural Gas Company v. Beeler*, 315 U. S. 651, 86 L. Ed. 1094).

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